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**Sunoco, Inc. (R&M) and Atlantic Independent Union.**  
Case 4–UC–413

June 16, 2006

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

On September 7, 2005, the Regional Director for Region 4 issued a Decision and Order dismissing the Employer-Petitioner's unit clarification petition as untimely. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. In its request for review, the Employer-Petitioner (Employer) contended that the Regional Director erred in measuring the timeliness of the petition from the date on which the employees ratified the collective-bargaining agreement, rather than using as a benchmark the date of the contract's execution, and that her finding that the Employer failed to file its petition "shortly after" ratification of the contract runs contrary to the Board's policy of encouraging voluntary resolution between parties. The Union filed an opposition to the request for review. The Board granted the Employer's request for review on December 7, 2005. Thereafter, the Employer filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record as it pertains to the issue of the petition's timeliness, as well as the Employer's brief on review, we find, contrary to the Regional Director, that the Employer's petition was timely filed. Accordingly, we reinstate the petition and remand this case to the Regional Director for further consideration on the merits.

**I. FACTS**

The Employer is a subsidiary of Sunoco, Inc. The Employer manufactures petroleum products and distributes these products on a retail and a wholesale basis. The Union has, for a number of years, represented a bargaining unit consisting of the "operating and clerical employees" employed at 15 of the Employer's 25 terminals. The unit is comprised of three different job classifications: terminal operators, drivers, and mechanics.

Prior to February 2002, the Employer's operations were divided into several business units, including a logistics unit. The logistics unit was responsible for main-

taining the two pipelines that transported petroleum products from Sunoco, Inc.'s refineries to storage terminals. The logistics unit also delivered the petroleum products by truck to retail and wholesale customers.

In February 2002, Sunoco, Inc. restructured its operations by transferring its assets relating to pipeline and terminal operations from the Employer to a newly-created limited partnership called Sunoco Logistics Partners, LP (Logistics). Sunoco, Inc. concurrently created Sunoco Partners, LLC (Partners), another subsidiary, to serve as a general partner of Logistics.

After the restructuring, Logistics, a publicly-traded company, assumed responsibility for receiving petroleum products from pipelines and monitoring such products at terminals. The Employer retained responsibility for delivering the product to retail locations and homes, as well as for maintaining the retail facilities. This corporate restructuring enabled Logistics, as a separate entity from the Employer, to market its services both to the Employer as well as to third parties.

Following the restructuring, bargaining unit terminal operators were transferred from the Employer's payroll to that of Partners. The drivers and mechanics remained on the Employer's payroll. From February 2002 until the fall of 2003, terminal operators, drivers, and mechanics were all supervised and managed by Partners personnel. In the fall of 2003, the Employer created a "transportation group" to manage the drivers and mechanics. From that point on, only the terminal operators remained under the supervision of Partners. The Employer now supervises the drivers and mechanics.

In October 2003, the Employer and Union met to bargain over a successor to the collective-bargaining agreement set to expire on March 31, 2004. Because Partners employed the terminal operators in the bargaining unit, it also participated in the negotiations. During an October 2003 bargaining session, the Employer and Partners proposed splitting the bargaining unit into two separate units: one consisting of drivers and mechanics employed by the Employer, and the other consisting of terminal operators employed by Partners. The Union rejected this proposal.

The parties met again on January 12 or 13, 2004, as well as on February 5, 2004.<sup>1</sup> By February 5, the parties had agreed on all contractual matters except for the unit scope. On or before April 1, representatives of the Employer withdrew the proposal for separate units so as to permit the parties to reach a contract agreement, while

<sup>1</sup> All dates hereafter are in 2004, unless otherwise indicated.

expressly communicating to the Union the Employer's intent to file a unit clarification petition.<sup>2</sup>

On April 22, the Union sent the agreed-upon contract, supplied in the form of a Memorandum of Agreement, to its membership for ratification. Accompanying the Memorandum of Agreement was a letter informing the membership that the Employer had withdrawn its proposal for separate contracts and that the Employer planned to take the issue to the Board.

The Union's membership ratified the contract on May 17, and the Union informed the Employer of the ratification around that same date. The Employer then retroactively implemented the contractually agreed-upon wage increases effective March 1.<sup>3</sup>

Subsequently, in a September 27 letter from the Employer to the Union, the Employer again expressed its intention to file a unit clarification petition unless the Union agreed to exclude the terminal operators from the unit. In this letter, the Employer explained its reasons for believing that a unit including terminal operators was not appropriate, and invited the Union to negotiate further on the issue. The Employer also stated that it would afford reciprocal seniority rights between the drivers-mechanics unit and a unit consisting of terminal operators if the Union would agree to exclude the terminal operators from the current unit.

The Union responded in an October 7 letter, stating that it would "vigorously contest" any effort by the Employer and Partners to change the composition of the contractually agreed-upon unit, and that, after reviewing the legal arguments the Employer raised in the September 27 letter, the Union believed that the Employer would receive an unfavorable determination if it filed a unit clarification petition with the Board. In concluding its letter, the Union stated that "without prejudice to our position regarding the impropriety of your legal theory," the Union is always willing to meet and discuss "issues of mutual importance and concern."

<sup>2</sup> The Employer maintains that the parties came to a contract agreement on March 22. The Union contends that no such agreement was reached until March 31. It is undisputed that Employer representative Ruth Clauser sent Union President John Kerr a letter dated March 24 affirming that the Employer had withdrawn its proposal with respect to separate contracts, and that the Employer planned to file a unit clarification petition. The Union acknowledges receiving this letter on or around April 1.

<sup>3</sup> The ratified contract has not yet been executed. The Union contends, and the Employer does not dispute, that sometime after February 2005 the Union reviewed the finalized contract draft, signed the contract, and returned it to the Employer. Although the Employer has not signed the contract, the Employer does not contend that there is no contract or that it does not intend to sign the contract.

Negotiations between the parties with respect to the issue of separate units took place in October and again in early January 2005. The parties agreed to keep the substance of these negotiations "off the record," but to include in this proceeding the fact that the negotiations took place. In January 2005, the Union submitted a proposal to the Employer relating to the issue of unit clarification. Attached to the Union's January 2005 proposal was a fax cover sheet where Kerr, the Union's president, had written, "sorry it took so long to get back with the Holidays and Vacations."

The parties' negotiations were unsuccessful, and the Employer filed its unit clarification petition on January 19, 2005. At the opening of the hearing, the Union argued that the Employer's petition should be dismissed as untimely. The Regional Director denied this motion. A later hearing focused on the appropriateness of the unit. At the conclusion of that hearing, the Union renewed its motion to dismiss the petition on timeliness grounds. The Regional Director granted this motion.

## II. APPLICABLE LAW AND ANALYSIS

The Board generally dismisses unit clarification petitions submitted during the term of a collective-bargaining agreement where the contract clearly defines the bargaining unit. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). The Board's rule is based on the rationale that entertaining a unit clarification petition during the term of a contract that clearly defines the bargaining unit is unnecessarily disruptive of the parties' collective-bargaining relationship. As stated in *Edison Sault Electric Co.*, 313 NLRB 753 (1994), "to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition."

Notwithstanding this general rule, the Board recognizes a limited exception in cases where parties cannot agree on whether to include or exclude a disputed classification "but do not wish to press the issue at the expense of reaching an agreement." *St. Francis Hospital*, 282 NLRB 950 (1987).<sup>4</sup> In such a case, the Board will process a unit clarification petition filed "shortly after" the contract is executed so long as the party filing the petition did not abandon its position in exchange for bargaining concessions. *Id.* at 951.

The Board has not established specific time limits with respect to the requirement that a unit clarification petition

<sup>4</sup> See also *Rock-Tenn Co.*, 274 NLRB 772 (1985), and *Batesville Casket*, 283 NLRB 795 (1987), both involving situations where the petitioner sought to clarify an existing bargaining unit into two separate units.

be filed “shortly after” the execution of the contract. In *St. Francis Hospital*, supra, 282 NLRB at 950, the Board permitted a unit clarification petition filed 7 weeks after contract execution. Id. In *Baltimore Sun Co.*, 296 NLRB 1023, 1024 (1989), the Board stated that *St. Francis Hospital* “should not be construed as setting a precise or outer time limit for the filing of such petitions” and concluded that a petition filed 11 weeks after contract execution fell within the “shortly after” limitation. The Board there noted a lack of evidence that the union involved was disadvantaged by the employer’s delay in filing the petition. 296 NLRB at 1024.

As an initial matter, we agree with the Regional Director’s decision to use the date that the employees ratified the Memorandum of Agreement as the starting point from which to measure the timeliness of the petition. The parties here clearly manifested the intent to be bound by the Memorandum of Agreement the employees ratified on May 17. The Employer implemented the wage increases agreed on in the contract soon after the Union informed the Employer that the employees had ratified the Memorandum of Agreement, and the Employer neither asserts that it believes itself not to be bound by the Memorandum of Agreement nor that it is refusing to sign the Memorandum of Agreement.

We find no merit in the Employer’s contention that the timeliness of its petition should be measured from the date that the contract was executed (an event which has not yet occurred). The Employer’s reliance on *Baltimore Sun* for this proposition is misplaced. In that case, the Board found the relevant time period was that between the execution of the contract and the filing of the petition. There, however, the parties executed the contract exactly 1 month after the contract’s ratification, and there was no evidence of significant administrative delays in the contract’s execution. 296 NLRB at 1024. Using the date of contract execution in *Baltimore Sun* thus provided no incentive for parties to delay in signing a contract. Here, in contrast, where the contract has yet to be executed, using the date of execution would serve only to reward the parties for creating administrative time delays, as well as shift focus away from the parties’ intent to be bound by the contract.

Notably, in *Edison Sault Electric*, supra, the Board looked to the date of contract ratification—and not the date of execution—in holding the petition to be untimely. 313 NLRB at 753. Although *Edison Sault Electric* relied primarily on the employer’s failure to preserve during bargaining its right to file a unit clarification petition, the

case nevertheless demonstrates that the date of ratification can be used as a benchmark.<sup>5</sup>

Turning to the issue of timeliness, and evaluating timeliness from the date of ratification, we find merit in the Employer’s argument that its petition is timely.

Here, the Employer sent a letter on September 27 containing a bargaining proposal. The Union responded with a letter on October 7 affirming its openness to negotiating. In these circumstances, the period for measuring the timeliness of the petition was tolled by the parties’ decision to engage in further negotiations, and did not resume until January 2005 when those negotiations proved unsuccessful (after which the petition was promptly filed). We find that, in the context of this case, the gap between contract ratification and the start of negotiations was not so long as to go beyond the Board’s “shortly after” requirement and render the petition untimely.<sup>6</sup>

Although the time period involved here is longer than those that barred the petitions in *Baltimore Sun* and *St. Francis Hospital*, the Board in *Baltimore Sun* explicitly stated that *St. Francis Hospital* should not be construed as setting any sort of outer limit concerning the timeliness of unit clarification petitions. *Baltimore Sun*, 296 NLRB at 1024. Further, finding this petition timely advances the Board’s policy of promoting voluntary resolution of disputes and encouraging parties to avoid litigation. Indeed, following the time gap, the parties engaged in several months of bargaining aimed at resolving the issue of unit composition. Such negotiations should be promoted and not discouraged.

We recognize, as argued by the Union, that the time lapses between the ratification vote and the filing of a unit clarification petition may have had some disruptive effect on the parties’ collective-bargaining relationship, and may have created some uncertainty about the status of an agreement. However, as noted, during the period from October to January, 2005, the parties were negotiating in an effort to resolve the matter without litigation.

<sup>5</sup> We reject, however, the Regional Director’s alternative finding that the relevant time period could be marked from the date on which the parties reached a full agreement on a contract. First, the parties dispute the exact date on which the Employer withdrew its proposal to split the unit and, consequently, the date by which the parties reached agreement on all other contractual issues. Second, and even more importantly, the contract’s provisions did not take effect until the employees ratified the agreement. For that reason, it was not reasonable to require the Employer to file its petition before ascertaining whether the contract that is the subject of the unit scope dispute would even come into being.

<sup>6</sup> Although the Employer maintains that the parties continued to have discussions and exchange correspondence and proposals from March 2004 through January 2005, the record contains no evidence of any negotiations taking place between the May 17 ratification and the Employer’s September 27 letter.

Concededly, the Employer did not seek those negotiations until September 27. The negotiations occurred in the context of the parties' understanding that the Employer intended to file a UC petition. In essence, by agreeing to discuss the matter, the parties hoped to reach agreement and thereby avoid the necessity for a filing of a UC petition. The parties then engaged in several months of bargaining. After those discussions collapsed, the Employer promptly filed the petition. We believe a finding that the petition is timely in this case furthers the Board's policy of encouraging voluntary negotiations.

Having evaluated all of the circumstances of this case, and carefully balancing the countervailing concerns, we find that the time span is not so long a period as to support the Regional Director's finding that the petition was untimely filed. Nor is this time gap meaningfully distinguishable from the delays that the Board found acceptable in *Baltimore Sun*, supra, 296 NLRB at 1023, and *St. Francis Hospital*, supra, 282 NLRB at 950.

We emphasize that our discussion is limited to the question that is currently before the Board on review: whether the unit clarification petition was timely filed. We do not pass on the Employer's contention that the Board should grant the petition on the ground that, absent unit clarification, the Employer would be required to bargain with an inappropriate, multiemployer unit. *Oakwood Care Center*, 343 NLRB No. 76 (2004). Nor do we reach the issue of whether the Employer's restruc-

turing resulted in significant organizational changes that offset the community of interest previously existing among the terminal operators, drivers, and mechanics. See *Rock-Tenn*, supra, 274 NLRB at 772; *Batesville Casket*, supra, 283 NLRB at 795. These are issues for the Regional Director to address in the first instance.

Accordingly, the Regional Director's Decision and Order is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action.

#### ORDER

IT IS ORDERED that the petition be reinstated, and that this matter be remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. June 16, 2006

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Robert J. Battista,	Chairman
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Peter C. Schaumber,	Member
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Dennis P. Walsh,	Member
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